

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SINGULAR COMPUTING LLC,)
)
Plaintiff) Civil Action
)
) No. 19-12551-FDS
vs.)
)
GOOGLE LLC,)
Defendant)

BEFORE: CHIEF JUDGE F. DENNIS SAYLOR, IV

STATUS CONFERENCE CONDUCTED BY ZOOM

John Joseph Moakley United States Courthouse
1 Courthouse Way
Boston, MA 02210

December 7, 2022
4:00 p.m.

Valerie A. O'Hara, FCRR, RPR
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1 APPEARANCES:

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1 weeks and perhaps a couple days after Memorial Day as a safety
2 valve. I think no one has said that there's a conflict for
3 that period. Does that sound workable to you all? Mr. Hayes.

4 MR. HAYES: Yes, your Honor, that's fine.

5 THE COURT: All right.

6 MR. VAN NEST: Your Honor, excuse me, we didn't make
7 our appearances, I apologize. Bob Van Nest from Keker,
8 Van Nest for Google. I'm here with Andy Bruns from our office
9 and with Matthias Kamber from Paul Hastings and Nathan Speed
04:03PM 10 from the Wolf, Greenfield firm in Boston.

11 I don't think that's workable given that the schedules
12 that the parties have agreed to so far, to be honest, your
13 Honor, because our current schedule has us filing Dauberts and
14 summary judgment motions on April 7th.

15 And I can advise the court, I think the summary
16 judgment motions are going to be very heavy, at least from the
17 Google side, particularly on non-infringement and the Dauberts
18 may be as well, although as your Honor knows, we haven't seen
19 the expert report yet, so if we're filing Dauberts and summary
04:03PM 20 judgment on April 7th, then there would be, obviously,
21 oppositions and possibly replies.

22 I don't see how we could start a trial in May, given
23 that I think the court's going to need some time to set a
24 hearing, to hear the motions, to decide the motions, and I was
25 going to suggest a trial date later in the year for that reason

1 and another, which I can get to in a minute, but I think the
2 May period is unrealistic, given what the parties and the court
3 have agreed to so far as part of the pretrial.

4 THE COURT: Well, that segues into my next topic. I'm
5 aware of the current schedule and I guess my constellation of
6 topics, which is in no particular order, I think it is
7 difficult in my experience to schedule a matter of any
8 complexity in the summer. It's not impossible, of course. In
9 criminal cases, we do it all the time, but, you know, everybody
04:05PM 10 has a conflict, everybody has a vacation, expert witnesses,
11 it's just hard to make all the stars align, and I think as a
12 practical matter, if we don't do it in May or perhaps June,
13 we're off until September.

14 As far as summary judgment motions go, I have one
15 pending now. Do we really need to wait to the deadline to file
16 motions for summary judgment? If you know, for example, that
17 you are bringing a motion for summary judgment of
18 non-infringement, why does it have to wait until April to be
19 filed, and would it be the end of the world if we try to
04:05PM 20 confine that to Daubert motions and to compress that timetable
21 somewhat? I'm tossing all those out as ideas and comments.

22 I understand there's a lot of moving pieces here.
23 It's not my intention to make anyone's life miserable, and to
24 be blunt about it, this is not a subject matter where I can
25 always turn on a dime. It's not a slip and fall at a Wal-Mart.

1 Sometimes it takes me a while to understand what the parties'
2 arguments are, but let me start with the question of do you
3 need to wait until April to file a motion for summary judgment
4 of non-infringement if you know and believe right now that
5 there is a meritorious such motion?

6 MR. VAN NEST: Your Honor, I think we have to wait
7 until close to that time, maybe not all the way, but neither
8 party has filed opening expert reports yet. Those aren't going
9 to be filed until later this month, and then rebuttal reports
04:06PM 10 aren't going to be filed until I think February, and then we'll
11 have a period of expert discovery where the experts will be
12 deposed, and, obviously, as your Honor is well aware, in a
13 patent case like this, putting aside damages even for just a
14 minute, it's the expert testimony that's critical, and the
15 expert reports and depositions are critical, and, no, so, I
16 don't see on the current schedule that we could file the
17 motions much earlier than April 7 given the schedule we've got
18 for expert reports and expert discovery.

19 We also have, obviously, a damages case, too, and
04:07PM 20 that's relatively complex in a case like this. I think there
21 we're talking a lot more about Dauberts than a summary judgment
22 issue, although I wouldn't rule it out, but I know they'll be
23 summary judgment, at least on non-infringement, but I think
24 that's going to have to wait to see exactly what their expert
25 report says and what their expert testifies to, what our

1 experts say and testify to, so while we could probably compress
2 it a little bit, I don't think much based on the parties'
3 current agreement and the current schedule.

4 I do think -- oh, excuse me.

5 THE COURT: Again, I obviously, I'm pushing back
6 somewhat in the abstract here because I don't quite know every
7 detail, well, I don't know any of the details, I should say,
8 but it's rare, to say the least, that summary judgment is
9 granted on the basis of an expert report unless the other
04:08PM 10 side's expert makes some big concession, you know, summary
11 judgment tends to turn on fact, not disputed expert opinions.

12 You know, in a patent case involving a widget, you
13 know, I construe the claim, and you say, well, look the widget
14 in question doesn't have the patented shape or knob or function
15 or whatever it is that is claimed, and, therefore, you know, we
16 haven't infringed, and it's not clear to me, you know, I can't
17 compete among or I can't sort out competing expert reports that
18 are based on credibility on summary judgment, and you're
19 telling me you believe you have a meritorious motion of
04:09PM 20 non-infringement. You must have some expert, you must have
21 some facts backing that up. Why do you need to depose your
22 deponent's expert to make that case?

23 MR. VAN NEST: Well, I don't disagree in general, your
24 Honor, that summary judgment turns on facts. I would say that
25 this is a fairly complex technology area, and I do think that

1 the plaintiff's opposition is going to rest largely upon their
2 expert's testimony attempting to establish infringement, so
3 while you're quite right that the facts about how the Google
4 TPUs operate are going to be critical, that's certainly true,
5 and it's certainly true that the witnesses have testified the
6 percipients about that and documents have been exchanged.

7 I do think that the expert analysis on both sides is
8 going to be critical to helping your Honor understand and
9 decide the case, and so I think it would be highly unusual and
04:10PM 10 I think imprudent on my part to say that I could file a summary
11 judgment motion without knowing what their certain is going to
12 say, which I don't know yet both in his report and in his
13 testimony.

14 So while I'm not averse to, you know, re-evaluating
15 the schedule, I think the schedule we have for a case of this
16 complexity magnitude is perfectly appropriate and with one
17 caveat, which I'll get to in a minute, I do think that the
18 September time frame, I agree with you that summer is difficult
19 and the parties have a lot of conflicts, but you do have
04:11PM 20 competing letters with three weeks in September that are open,
21 and I really think that given the schedule, if we stay with
22 what we've all agreed to, that's going to give us time to do
23 the Dauberts, do the summary judgment, give your Honor time to
24 evaluate the case, do a realistic pretrial, and have this case
25 ready for trial if we need one in the fall.

1 I'll have one caveat to that in a minute, but I do
2 think if your Honor wishes to set a date today, that
3 September time is more realistic based on the schedule that the
4 parties agreed to.

5 THE COURT: And what is that caveat?

6 MR. VAN NEST: It's the point that we made briefly
7 last time, which is that -- and what I'm going to suggest as an
8 alternative is that we set another CMC in January. The
9 plaintiffs are appealing the IPR result. There are a number of
04:12PM 10 claims, as your Honor is aware, on which Google prevailed.
11 They're asking the Federal Circuit to adopt a claim
12 construction different from what your Honor has adopted for
13 this case.

14 If the Federal Circuit were to adopt that, it would be
15 binding on all of us, and it would provide yet an additional
16 basis for non-infringement for the defendants.

17 Now, it's not one that we have now, it's a different
18 argument, but it's one that we would have if the Federal
19 Circuit were to adopt a claim construction. Your Honor has
04:12PM 20 given us I think plain and ordinary meaning on this term. I
21 don't know for sure whether the plaintiffs are going to make
22 this claim. They did make it in the PTAB, but we will know
23 that by January because their brief will be filed. It does
24 seem to me that if that's going to go on, it does not make a
25 lot of sense to schedule a trial before we know what the

1 Federal Circuit is going to say about the claim construction,
2 in which case I think we would need to set a trial date later
3 in the year or maybe even in January, but the briefing on the
4 appeal will be done in the spring, and then they'll be a
5 hearing, as your Honor knows, in the Federal Circuit, and then
6 they'll be a decision, but I think the parties anticipate a
7 decision in the mid-fall on the IPR appeal, and we'll know
8 exactly what arguments Singular intends to raise here in a
9 couple of weeks, and I think we would be better off just giving
04:13PM 10 ourselves another CMC shot at this in January when we could
11 make a final decision on the date.

12 The September date would still be available for
13 everybody if the Court felt that was appropriate, but if I'm
14 right, and they're going to raise this issue, I don't think it
15 makes sense to spend court time and client time and money until
16 we know what the claim construction is going to be. That's my
17 caveat.

18 THE COURT: Okay. Mr. Hayes, do you want to respond?

19 MR. HAYES: Yes, my comment is, your Honor, I think we
04:14PM 20 should try the case in May simply because otherwise I think it
21 will be the twelfth of never. My Brother's indication that he
22 won't know vis-à-vis on the appeal until January is incorrect.

23 Our brief is due, our response, December 22nd, which
24 is in a week or so, and I could tell right now we are not going
25 to appeal the -- as my Brother suggests, that's not going to be

1 an issue before the CAFC, so this argument that he's generated
2 to delay the twelfth of never is moot, and my Brother will know
3 it's moot come December 22nd. I think we're ready, this case
4 has been pending for three and a half years, and at some point
5 it needs to be tried, and that's the only way we're going to
6 get to a negotiable settlement, if there is one.

7 With that said and done, we're available in May,
8 Judge, and we think that's the appropriate time to do it. With
9 respect to summary judgment, they can file their summary
04:15PM 10 judgment of non-infringement any time they want. We filed our
11 summary judgment on the issue of estoppel just so this issue
12 doesn't raise that everybody is going to clog up the courts so
13 delay, delay, delay.

14 They can file it right. It's a question of fact.
15 It's nothing to do with expert discovery, expert testimony. In
16 fact, if you want to just competing experts that's going to
17 generate a question of fact, if anything, so I think that if
18 they have a summary judgment, and it's time for them to either
19 put up or shut up, frankly, and certainly not to delay this
04:16PM 20 case.

21 May, I think we're ready in May, and, you know, that's
22 it. They can file the summary judgment any time they want.

23 THE COURT: Any response to that, Mr. Van Nest?

24 MR. VAN NEST: Of course. Thanks, your Honor. I'll
25 take counsel's word for it if he's saying that he's not going

1 to appeal the claim construction or seek an alternative claim
2 construction in the Federal Circuit, I'll take his word for
3 that, and if I'm wrong, we can let the court know that in a
4 week or so, but his brief is due coming up here soon.

5 I looked back at the schedule that the parties have
6 already agreed to, and our rebuttal reports aren't due until
7 February 10th. The close of expert discovery is not until
8 March 10th, and that's why the parties agreed very recently to
9 a Daubert and summary judgment schedule of April 7. That's
04:17PM 10 what we all negotiated and agreed to, and that's the schedule
11 that the court gave.

12 I think in light of Mr. Hayes' comments that the
13 September period is appropriate, it allows us to maintain the
14 schedule that everyone has agreed to. It is not customary and
15 not fair to require somebody to make a summary judgment motion
16 until they know exactly what both parties' experts are going to
17 say and how that shakes out based on the facts, and so I
18 maintain my objection to the May date. I think the
19 September date, which is open for both parties on the calendar
04:17PM 20 is what is most appropriate in light of the work that's got to
21 be done to get us there.

22 MR. HAYES: Your Honor, just one point, if I may. I
23 never said I agreed to September. I don't know where my
24 Brother got that from.

25 THE COURT: He didn't say there was a conflict.

1 MR. HAYES: There's no conflict, there's no conflict
2 three years from now, that's not the issue. The issue is I
3 never agreed that we would do it then, and I think it's time to
4 do this. If they have a summary judgment, they could file it
5 at any point in time.

6 By the way, what we agreed to, that date of April 7th
7 is the last date on which you could file a summary judgment,
8 not the first date, and they have from now to then if they want
9 to file a summary judgment of non-infringement to do it. They
04:18PM 10 could do it within two weeks I'm sure if you ordered them to do
11 that.

12 With all due respect, it's just another delay tactic,
13 delay, delay, delay, and now I've put to bed this issue of
14 Court of Appeals, and by the way, Judge, we have agreed to
15 dismiss the present -- the second suit we've agreed to dismiss
16 it.

17 We've agreed to dismiss Count Three to speed this up.
18 I've given them a covenant not to sue, which we've negotiated
19 and I've agreed to, and I've done everything to try to get this
04:19PM 20 case to trial, and I think May is the time to do it.

21 MR. VAN NEST: Your Honor, my point is not that
22 counsel agreed, my point was simply looking at the letters,
23 we've got a three-week window in September when neither party
24 has a conflict, that's my only point, and I do think it's
25 unfair after just negotiating a schedule where we don't

1 complete expert discovery until March 10 to suddenly say we're
2 going to get Daubert, summary judgment, pretrial and limines
3 and all that done in a month and a half. That's just not
4 realistic in a case of this magnitude. I haven't even seen
5 their damages report, your Honor, I won't get that until the
6 22nd, but I can imagine that it will be a whopper, and so
7 there's going to be a lot of work to do on the expert reports
8 and Dauberts there as well, so I don't think this is so
9 unusual, this is not -- this is a case for dollars. That's
04:20PM 10 what it is, and so I don't think that the September date is
11 unrealistic at all, and, in fact, I think it will give
12 everybody time to, you know, get this case properly prepared.

13 If I'm right, we may not need a trial. I just don't
14 see that May is realistic with the schedule that we have,
15 that's my point.

16 MR. HAYES: My only point, Judge, this isn't just a
17 case for dollars, this is a case for Dr. Bates' invention
18 that's been sitting for three and a half years. It's not just
19 dollars. This is his entire life in this case, not dollars,
04:21PM 20 counsel, and I think we should get it over with and try the
21 case, period. If you've got a summary judgment, file it.

22 THE COURT: All right. Here's what I'm going to do.
23 I'm going to let this percolate, I'm going to make a decision
24 promptly because we need to belong off the time. For what it's
25 worth, I'm not going to try this case any earlier than May, and

1 I'm not going to try it any later than September. That's the
2 window. I don't set trial dates for interior purposes in
3 order to try to force settlement or to make everyone's life
4 miserable, it's going to be a real trial date. I'm not going
5 to set anything else for that date, and I'm not going to move
6 it come anything short of a new pandemic or eruption of a
7 volcano under the courthouse or something of that sort.

8 For what it's worth, if the parties say this is an 8-
9 to 10 day trial and if I set aside 10 days, I expect it to be
04:22PM 10 tried in 10 days. I'm sure you're experienced, and I don't
11 need to tell you this, but jurors are not normally masochistic,
12 and they like brisk, clear presentations, and I don't like
13 telling counsel how to try their case, I don't like gimmicks,
14 like chess clocks, or artificial limitations or whatever, but
15 whatever period I set, and we'll have a safety valve of some
16 sort because sometimes things do happen, but that's going to be
17 the trial date, and we're going to fit it within that window,
18 and I expect that there will be a clear, brisk, streamlined
19 presentation.

04:23PM 20 Because I agree to a considerable extent with both of
21 you, I want to think about this a little bit more, look at the
22 calendar, look at the docket here a little bit more and think
23 about this. I make no promises one way or the other, but I
24 doubt I'll do it in the summer, but I'm not foreclosing that
25 either. It's either going to be the middle of May or the

1 beginning of September. Those are going to be the dates, and
2 I'm going to keep that under advisement for a short period of
3 time.

4 In the meantime, the current pending summary judgment
5 motion, have I set a date for argument on that? I know the
6 briefing is due I think in about a week, maybe a little more
7 than a week. Did I set a date for that?

8 MR. VAN NEST: You have not yet set a date for that,
9 your Honor. We do have the briefing schedule. You're quite
04:24PM 10 right, our opposition is due on Friday.

11 THE COURT: Okay. But there's no date yet?

12 MR. VAN NEST: There's no date for a hearing that I'm
13 aware of.

14 THE COURT: Matt, what do I have on the second week of
15 January, early in that week ideally?

16 THE CLERK: It looks like we're on trial that week,
17 Judge, but the afternoon of Wednesday, the 11th is open.

18 THE COURT: January 11th, Wednesday at we'll say 3:00
19 eastern time for oral agreement on that motion.

04:24PM 20 MR. VAN NEST: Your Honor, will that be over Zoom as
21 well?

22 THE COURT: Yes.

23 MR. VAN NEST: The 11th at noontime is fine for
24 Google.

25 THE COURT: Mr. Hayes, does that work for you as well?

1 MR. HAYES: Yes, it does, Judge.

2 THE COURT: All right. That's what we'll do, and I'm
3 going to make a decision about the trial date forthwith, we
4 need to block off that time one way or the other and adjust the
5 schedule if I'm going to adjust it.

6 MR. HAYES: Thank you, your Honor.

7 THE COURT: Anything else we need to take up,
8 Mr. Hayes?

9 MR. HAYES: No, your Honor.

04:25PM 10 THE COURT: Mr. Van Nest?

11 MR. VAN NEST: No, your Honor.

12 THE COURT: Thank you.

13 (Whereupon, the hearing was adjourned at
14 4:25 p.m.)

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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I do hereby certify that the foregoing transcript,
Pages 1 through 18 inclusive, was recorded by me
stenographically at the time and place aforesaid in Civil
Action No. 19-12551-FDS, SINGULAR COMPUTING LLC vs. GOOGLE LLC
and thereafter by me reduced to typewriting and is a true and
accurate record of the proceedings.

Dated December 12, 2022.

s/s Valerie A. O'Hara

VALERIE A. O'HARA

OFFICIAL COURT REPORTER